

## **DEB Notice 100104 – Revision 1 to CPSM, 2004 edition**

### **Effective October 1, 2004**

All projects that do not have an approved Preliminary (CO-5), or have not made a substantially complete Working Drawing submittal by the effective adoption (October 1, 2004) shall comply with ADAAG as adopted by the revised Construction and Professional Services Manual. Upon written request, projects which have an approved Preliminary design or have made a substantially complete Working Drawing submittal may use ADAAG after receipt of written approval from the Director of DEB.

### **Revision to the 2004 CPSM**

The Commonwealth of Virginia's Construction and Professional Services Manual, 2004 Edition, is revised as described below effective October 1, 2004. These revisions to the CPSM, 2004 Edition, shall be called "Revision 1" to the Manual.

### **RECORD OF REVISIONS - Insert**

"1	October 1, 2004	10/01/04	WWS"
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## CHAPTER 4: PROCUREMENT PROCEDURES FOR PROFESSIONAL SERVICES

Make the following changes:

406.0 Small Business and Businesses Owned by Women and Minorities – Add to read “.....Failure to provide information required by the RFP will ultimately result in rejection of the proposal as non-responsive. See DGS-30-360 format on the Forms Center for format and data requirements.

The following data is required on each small business, women-owned business and minority-owned business: (1) Type of ownership and DMBE Certification Number, if certified (2) utilization in the most recent twelve (12) months of DMBE certified firms, and (3) planned involvement or services to be performed by DMBE certified firms on the proposed project. (The formats for submission of this data are included at Forms Center website. URL is <http://forms.dgs.virginia.gov>)”

Add Section 416 as follows:

### **Section 416.0 SWAM Procurement Plan**

(Small, Women-owned, And Minority-owned businesses)

**416.1 Agency Plan:** In accord with Executive Order 29 (2002), an annual SWAM Procurement Plan that specifies the Agency’s plans and goals for SWAM procurement is required. Department of Minority Business Enterprises (DMBE) certification of SWAM businesses is required. Plan guidelines are available from DMBE. The plan shall be updated each September 1<sup>st</sup>.

**416.2 Audits:** In order to assure compliance with certification requirements of SWAM subcontracting plans, the contracting or certifying agency or institution shall contractually provide for appropriate auditing of vendors and contracts. Such audits shall include the right to make on site audits at any time during the term of the applicable contract or certification.

## **CHAPTER 7: ENGINEERING REQUIREMENTS, POLICIES, AND CODE APPLICATIONS FOR BUILDINGS ON STATE PROPERTY**

Make the following changes:

**Delete:**

**SECTION 702.0 ACCESSIBILITY STANDARDS for STATE OWNED FACILITIES** in its entirety.

**Insert New Section 702 as follows in its Place:**

**SECTION 702.0 ACCESSIBILITY STANDARDS for STATE OWNED FACILITIES**

The Americans with Disabilities Act, 1990: Title II, Subtitle A, (and not Title III) of the Act applies to all state owned buildings and structures. The accessibility standards are the **Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), published July 23, 2004, excluding the Architectural Barriers Act (ABA) Scoping requirements.** (Access Board, Suite 1000, 1331 F Street, NW, Washington, D.C. 20004-1111 or [www.access-board.gov](http://www.access-board.gov)) For technical assistance, call the Office of Technical and Information Services at (202) 272-2253 or email [ta@access-board.gov](mailto:ta@access-board.gov). In addition, Non-Discrimination Under State Grants and Programs promulgated by the Board for Rights of Virginians with Disabilities and effective on October 1, 1990, implement § 51.5-40, Code of Virginia applies.

**702.1 Conflicting Standards / Modifications:** Where standards conflict, the most stringent standard shall be used in designing accessible facilities. That is, the standard most favorable or advantageous to the disabled shall be used. As ADA is a federal law, modification of the ADA law requirements cannot be granted by The Division of Engineering and Buildings. The Division of Engineering and Buildings reviews documents for compliance with these Standards during its normal review of capital outlay projects. Such review does not relieve design consultants from responsibility for designing in accord with the standards and Federal Law.

**702.2 Clarifications for State Owned Buildings and Buildings on State Owned Property:**

Accessible facilities must be provided at the completion of construction. Adaptable facilities do not meet the requirements for accessibility in state buildings and buildings constructed or placed on state owned property.

**702.2.1 Elevator Access:** Section 206.2.3, *Accessible Routes – Where Required – Multi-Story Building and Facilities* clarification: All passenger elevators shall be accessible to the disabled.

**702.2.2 Elevator Access:** Section 206.2.3, *Accessible Routes – Where Required – Multi-Story Building and Facilities*, *Exception 4* does not apply. Residential facilities shall include at least one accessible route to connect each story and each mezzanine in multi-story buildings and facilities.

**702.2.3 Stairways:** Section 210.1, *Stairways – General* clarification: All stairways shall be accessible to the disabled.

**702.2.4 Stairways:** Section 210.1, *Stairways – General*, Exception 3 does not apply. Aisle stairways for assembly areas shall comply with Section 504.

**702.2.5 Handrails:** Section 505.10 *Handrails – Handrail Extension* clarification: Handrail extensions shall not be turned to the side or back. Handrail extensions shall continue straight and parallel to the stair run.

## **CHAPTER 9: DESIGN AND PROCUREMENT CRITERIA, POLICIES & GUIDELINES**

Make the following changes:

### **908.0 DOORS & WINDOWS**

908.1 Area of Glass in Exterior Walls – Delete this section and mark “Not Used”

## CHAPTER 10: CONSTRUCTION PROCUREMENT & ADMINISTRATION

Insert the following after Section 1001.7:

### **Section 1001.8 SWAM Procurement Plan**

(Small, Women-owned, And Minority-owned businesses)

**1001.8.1 Agency Plan:** In accord with Executive Order 29 (2002), an annual SWAM Procurement Plan that specifies the Agency's plans and goals for SWAM procurement is required. Department of Minority Business Enterprises (DMBE) certification of SWAM businesses is required. Plan guidelines are available from DMBE. The plan shall be updated each September 1<sup>st</sup>.

**1001.8.2 Prequalification:** SWAM Procurement Plans with identified goals for minority and women-owned business procurement, may include those goals as conditions or pre-qualification requirements in the terms and conditions for the award of any prime contract in excess of \$100,000 and, if so included, may reflect those goals in the requirement for a subcontracting plan prepared and submitted within 30 days of award for construction. See Section 1103.0, Prequalification Procedures.

**1001.8.3 Contract Size:** If the size of vertical or horizontal construction contracts appear to limit SWAM vendors from bidding or winning such contracts, then the contracting agency may seek to reduce the size of the contracts to increase the pool of potential SWAM bidders. If the effect of reducing the size of such contracts is to cause a meaningful increase in price, a significant degradation in terms and conditions, a significant decrease in administrative efficiency or non-compliance with applicable federal contracting requirements or funding conditions, then the contracting agency or institution shall not be obligated to so reduce the contract size. In the case of construction contracts awarded to non-SWAM primes, the prime contractor shall seek to size the subcontracts so as to enable qualified SWAM subcontractors to bid effectively for such work so long as the effect of reducing the size of such subcontracts does not cause a meaningful increase in price or a significant degradation in terms, conditions or other applicable contract factors. In the case of non-highway construction, where appropriate for the construction job in question, the Commonwealth shall consider using a Construction Manager "At Risk" instead of a prime contractor in order to afford opportunities for M/W contractors to bid effectively for the work in question. Nothing contained in this paragraph shall require the contracting agency to accept contractors who do not meet applicable quality, safety and performance standards.

**1001.8.4 SWAM Identification / Certification:** The contractor shall provide Department of Minority Business Enterprises (DMBE) certification for all work provided by SWAM contractors under the Agency SWAM Procurement Plan as soon as practicable after the signing of the contract.

**1001.8.5 Audits:** In order to assure compliance with certification requirements SWAM subcontracting plans, the contracting or certifying agency or institution shall contractually provide for appropriate auditing of vendors and contracts. Such audits

shall include the right to make on site audits at any time during the term of the applicable contract or certification.

#### 1003.0 Bid Period Activities

Insert the following at the end Section 1003.1:

§2.2-4301 of the *Code of Virginia*, “*Competitive Sealed Bidding*”, requires that Invitations For Bid (IFB) be ‘posted’ **or** advertised in a newspaper or both. When advertising in the newspaper, the Agency may post the full Notice of Invitation For Bid (such as DGS-30-256 ) or it may use the ‘short form’ Notice posting the minimum information as shown in DGS-30-252 . Notice shall also be posted on the DGS Internet procurement website, URL <http://vbo.dgs.state.va.us>.

§2.2-4301 of the *Code of Virginia*, “*Competitive Negotiation*”, requires that Requests For Proposals (RFP) be ‘posted’ **and** advertised in the newspaper of general circulation in the area. If the agency determines that the work can be procured by competitive negotiation, it must advertise the RFP in the newspaper as well as public posting and posting on the DGS Internet procurement website, URL <http://vbo.dgs.state.va.us>.

## **Chapter 11: SPECIAL CONSTRUCTION PROCEDURES**

Make the following changes:

### **1102.1 Construction Management Implementing Instructions**

Insert the following:

### **1102.2 CHECKLIST FOR CONSTRUCTION MANAGER “AT RISK” PROCUREMENT – BASIC PROCEDURE**

- Does project meet criteria for using CM?
- What is the Justification for using CM “At Risk”?
- What are the benefits for using CM?
- Is it ‘fiscally advantageous’ to use CM? (must explain in request or documentation)
- Prepare justification for using CM At Risk (also called CM/GC) procedure.
- Obtain approval to use CM “At Risk” procedure.
- When will CM be Hired? (at what stage of the project?)
- Do you intend to use CM for “Preconstruction” (i.e. design period) services?
- When will you require that the CM/GC give you a “Guaranteed Maximum Price” (GMP) ?
- Establish CM “AT RISK” Building Committee (Evaluation Committee) (BCOM must be represented on panel)
- Advertise for interested CM “At Risk” firms to submit qualifications or interest (RFQ) showing qualifications of both the ‘Firm’ and the ‘Team Members’ to do the construction. Use Prequalification procedures in Section 1103 and CO-16 .
- Use “Prequalification” format and procedures for ‘qualifying’ CM’s to receive the RFP (CO-16, Questionnaire, Attachment 1, Reference letter. Consent to contact references letter,etc)
- Determine “Qualified CM’s” to receive RFP
- Have Owner’s A/E prepare Schematics or Preliminary Documents (at least single line plans and elevations and outline specs to describe materials to be used and minimum level of quality and/or performance of systems.) for use by CM proposers in responding to the RFP. These are the documents which represent the current state of the project scope and design
- Send Request for Proposals to ‘Qualified’ CM “At Risk” firms asking them to submit detailed proposals showing qualifications of both the ‘Firm’ and the ‘Team Members’ to do the construction and complete the cost proposal form. Describe data you want the qualified firms to submit



- The RFP should include above Preliminary Documents , the CO-7 CM “AT RISK”, CO-9 CM “AT RISK” Contract and a Draft CM “At Risk” MOU project
- **Point out / emphasize the “SWAM” requirements that the CM must meet for the project.**
- Clearly point out that the CM “AT RISK” Contractor obtains and submits Performance Bond and Labor & Material Payment Bond, Insurances, etc, as part of the General Conditions Fee for the project
- Distribute the formal RFP to the selected group with deadline for submitting both a Service Proposal and a Fee / GMP Proposal
- Receive responses / proposals
- Review Responses and short list 3 (minimum) to 5 (preferred) qualified CM “At Risk” firms to be interviewed ‘face-to-face’ and make presentations.
- Conduct Interviews. Ask questions as necessary to determine the “best fit” firms for your project and Select 2 or 3 CM “At Risk” proposers for detailed negotiations
- Evaluate Technical Proposal and Cost Proposal from each respondent for conformance with requirements of the RFP and for a clear understanding by the Owner and the CM of what is required and what will be provided.
- If changes are required, to meet clarify and/or your requirements, advise each proposer individually of those clarifications and allow each to submit a revised Proposal including a modification to its previously submitted cost proposal or a new cost proposal. Specify deadline.
- Review revised Proposals for compliance with the requirements of the RFP and clarifications issued.
- Have ‘Preconstruction’ meeting with BCOM to coordinate the documents that will be required for the Building Permit and whether partial permits will be issued for sitework phase, foundation phase and building phase.
- Submit documents to BCOM for Review and Building Permit. Note that Owner / Agency still must have independent structural and special inspections and that the work must still be inspected by other than the CM “AT RISK” Contractor to assure conformance with the plans and specs.

- Inspections by BCOM and State Fire Marshal's Office Reps are required and a Certificate of Occupancy is required.

#### NOTES

- CM must be licensed in Virginia by DPOR as a Class A Contractor
- Must use all applicable CO- Forms, Contracts, etc for the project
- Must use CO-7CM "AT RISK" for General Conditions. See Forms Center.
- Must use CO-9CM "AT RISK" for Contract . See Forms Center.
- Must use an MOU similar to the Sample but made project specific

## **CHAPTER 13: MASTER PLANS; SITE AND UTILITY PLANS**

Add the following Section 1305:

### **SECTION 1305.0 AGENCY LAND USE PLAN**

- 1305.1** §2.2-1153, Code of Virginia, as revised, requires that each State Agency which possesses state-owned real property or proposes to acquire plant or property must have a Land Use Plan for each site or campus. Each State Agency is further required to submit a copy of each Agency Land Use Plan to the Division of Engineering and Buildings, Bureau of Real Property Management.
- 1305.2** To lessen the burden to Agencies of this requirement, the Bureau of Real Property Management will accept either the Agency “**Master Plan Maps / Graphic Plans**” described in Section 1302.4 above or the Agency “**Site Plan**” portion of the Site and Utility Plan described in Section 1303.3 (1) above as the Agency Land Use Plan for that campus or tract of land.
- 1305.3** Submissions of Agency Land Use Plans should be directed to the Bureau of Real Property Management. The Bureau's address is:  
Bureau of Real Property Management, Attn: Monica Melville  
805 East Broad St., Room 102,  
Richmond, VA 23219.

## APPENDICES

Make the following changes:

- A General Conditions of the Construction Contract (Form CO-7) and Standard Instructions to Bidders (Form CO-7A)

Insert the following Supplemental General Condition:

### **SUPPLEMENTAL GENERAL CONDITIONS**

THE COMMONWEALTH OF VIRGINIA GENERAL CONDITIONS of the Construction Contract, G. S. Forms CO-7 (2004 edition) (Rev 06/04) are modified and supplemented as hereinafter described.

1. Add the following Section 51 to the General Conditions of the Construction Contract:

#### **“51. Small Businesses and Women-Owned and Minority-Owned (SWAM) Business Procurement Plan**

The Owner has developed a “SWAM” plan for increasing procurement from small, women-owned, and minority-owned (SWAM) businesses in its construction program. The Owner’s SWAM aspirational goals and plan are included in the contract documents for use by the Contractor in developing its plan for involving small, women-owned, and minority-owned (SWAM) businesses thru subcontracting, and thru the purchasing of goods, materials, supplies and services in the Contractor’s construction program. The Owner’s plan provides criteria and goals for the Contractor in developing a plan, for submitting its plan and for reporting its achievements in meeting the goals established for the Contract.

The Contractor shall, as soon as practicable after the signing of the contract but not later than 30 days after the effective date of the contract, provide a list of Subcontractors that are proposed to perform the work, including SWAM subcontractors, vendors and suppliers showing their DMBE certification numbers where applicable.. Upon receipt of the list, the Owner may, based on the Agency SWAM Procurement Plan require the Contractor to provide additional information on work that has been bid by SWAM contractors, and areas in which the scope of work may be reduced in size to increase the pool of potential SWAM contractors. Selection of particular Subcontractors for a certain part of the work shall be made in accord with Section 9, Subcontracts of the General Conditions.

#### **MINORITY/WOMEN OWNED BUSINESSES SUBCONTRACTING AND REPORTING:**

Where it is practicable for any portion of the awarded contract to be subcontracted to other suppliers, the contractor is encouraged to offer such business to minority and/or women-owned businesses. Names of firms may be available from the buyer and/or from the Division of Purchases and Supply. When such business has been subcontracted to these firms and upon completion of the contract, the contractor agrees to furnish the purchasing office the following information: name of firm, phone number, total dollar amount subcontracted and type of product/service provided. See specific requirements in the Owner’s SWAM plan.

In the case of construction contracts awarded to non-SWAM primes, the prime contractor shall seek to size the subcontracts so as to enable qualified SWAM subcontractors to bid effectively for such work so long as the effect of reducing the size of such subcontracts does not cause a meaningful increase in price or a significant degradation in terms, conditions or other applicable contract factors.

Insert the following new Appendix O:

**O Small Businesses and Businesses Owned By Women and Minorities (SWAM)**

“Executive Order 29, issued in July 2002 by Governor Warner, established the framework for the participation of small businesses and businesses owned by women and minorities in the Commonwealth’s purchasing programs. Since EO 29 was issued, the Commonwealth has made significant progress towards diversifying its supply chain.

The Governor has now approved certain key recommendations of the Intersecretarial Task Force on Minority Procurement. These recommendations both continue and expand the thrust of EO 29 by directing agencies to adopt more specific and extensive remediation strategies.

SB 598 adopted by the 2004 General Assembly provides that, when purchases are made under a remedial plan established by the Governor, they may be partially exempt from the VPPA.

The Governor’s Chief of Staff, William H. Leighty, issued a Memorandum “SUBJECT: SWAM Procurement” dated July 30, 2004 to Heads of Executive Branch Agencies, Independent Agencies, and Institutions of Higher Education. The Memorandum addresses Governor Warner's plans for increasing state procurement from small, women-owned, and minority-owned (SWAM) businesses. The Memorandum also directs each institution and state agency to develop a specific plan for achieving its particular SWAM procurement goals, and complete that plan by September 1, 2004 where possible, and no later than October 1, 2004. Each institution and agency's plan will likely vary from the state goals, however, the sum of the agency/institution plans should reflect the overall state aspirational goals.

Copies of the following documents are copied into and are incorporated into this Appendix O of this Construction and Professional Services Manual:

- Executive Order 29, issued in July 2002 by Governor Warner
- SB 598 adopted by the 2004 General Assembly
- Governor’s Chief of Staff, William H. Leighty, issued a Memorandum “SUBJECT: SWAM Procurement” dated July 30, 2004 with Attachment.

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## COMMONWEALTH OF VIRGINIA



### OFFICE OF THE GOVERNOR

#### Executive Order 29 (2002)

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#### **EQUAL OPPORTUNITY IN STATE PROCUREMENT**

Meeting the challenges of the 21<sup>st</sup> century and the New Economy demands that the Commonwealth of Virginia maximize the participation of its citizens and enterprises in the commercial life of the Commonwealth. Thus, it is the policy of the Commonwealth to make sure that small businesses and businesses owned by women and minorities receive every opportunity to compete for the Commonwealth's expenditures for goods and services. Ensuring the inclusion of these businesses in state procurement processes constitutes not only good public policy but also good business and enlightened self-interest.

Just as equal employment opportunity must be an integral part of normal personnel policy, procedures, and practices, so the use of small businesses and businesses owned by women and minorities must be an important feature of the Commonwealth's normal purchasing policy, procedures, and practices. No potential supplier should be precluded from consideration on the basis of race, color, religion, gender, age, or national origin. Every attempt must be made to fully utilize all of the Commonwealth's resources, human as well as material, in an effort to obtain high quality goods and services at reasonable costs.

Every employee who is delegated the responsibility either directly or indirectly to commit the expenditure of funds for the purchase of goods and services on behalf of the Commonwealth is charged with making the objective of supplier diversity a reality. Success depends upon the full, unqualified participation and commitment of all such employees. Employees must conduct all procurement procedures and practices in a fair and impartial manner, avoiding any impropriety or appearance thereof.

The Virginia Public Procurement Act (VPPA), in Section 2.2-4310(A) of the *Code of Virginia*, prohibits all public bodies from discriminating against anyone seeking a contract from the state on the basis of that person's race, religion, color, sex, or national origin. Additionally, whenever a public body engages in a solicitation, it is required to "include enterprises selected from a list made available by the Department of Minority Business Enterprise." The Department of General Services' Procurement and Surplus Property Manual defines solicitation to include Invitations for Bids (IFB), Requests for Proposals (RFP), telephone calls, or any other document issued by the state to obtain bids or proposals for the purpose of entering into a contract.

Under Section 2.2-4310(B) of the VPPA, each public body is required to develop a written program "to facilitate the participation of small enterprises and enterprises owned by women and minorities in procurement" that includes cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. These programs must include provisions to ensure that the public body does not discriminate in the soliciting or awarding of contracts and that, when all solicitations are made, there are enterprises included in the solicitation selected from a list made available by the Department of Minority Business Enterprise.

By virtue of the authority vested in me under Article V, Section 1 of the Constitution of Virginia and Sections 2.2-103, 2.2-104, 2.2-106, and 2.2-1400 of the *Code of Virginia*, I hereby direct the Cabinet and all heads of all state agencies and public bodies to take the following action to implement the equal opportunity and nondiscrimination requirements set forth in the VPPA:

Each Cabinet Officer must submit to the Chief of Staff no later than August 15 of each fiscal year a written program from each agency or public body within his or her secretariat that aims to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions with the agency or public body that fiscal year. The first such report is due by August 15, 2002.

Such programs must include provisions to ensure that the agency or public body does not discriminate in the soliciting or awarding of contracts in violation of Section 2.2-4310 of the *Code of Virginia* and that, when solicitations are made, businesses are included in the solicitation that are selected from a list made available by the Department of Minority Business Enterprise. Each written program must address minority prime contracting and subcontracting and include strategies for continuous improvement in both areas.

Each agency's or public body's written program must be reviewed and approved by the applicable Secretary with the advice and assistance of the Secretary of

Administration, the Director of the Department of Minority Business Enterprise, and the Director of the Department of General Services.

To assist agencies in the development of required written programs, the Chief of Staff is authorized to develop a model written program, in consultation with the Secretary of Administration, the Department of Minority Business Enterprise, the Department of General Services, and the Office of the Attorney General.

This Executive Order shall be effective upon its signing and shall remain in full force and effect until June 30, 2006, unless amended or rescinded by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 2<sup>nd</sup> day of July 2002.

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Mark R. Warner, Governor

Attest:



Text of SB598 is as follows:

Be it enacted by the General Assembly of Virginia:

1. That §§ [2.2-4310](#) and [2.2-4343](#) of the Code of Virginia are amended and reenacted, and that the Code of Virginia is amended by adding a section numbered [15.2-965.1](#) as follows:

§ [2.2-4310](#). Discrimination prohibited; participation of small, women- and minority-owned business.

A. In the solicitation or awarding of contracts, no public body shall discriminate against a bidder or offeror because of race, religion, color, sex, national origin, age, disability, or any other basis prohibited by state law relating to discrimination in employment. Whenever solicitations are made, each public body shall include businesses selected from a list made available by the Department of Minority Business Enterprise.

B. All public bodies shall establish programs consistent with this chapter to facilitate the participation of small businesses and businesses owned by women and minorities in procurement transactions. The programs established shall be in writing and shall include cooperation with the Department of Minority Business Enterprise, the United States Small Business Administration, and other public or private agencies. State agencies shall submit annual progress reports on minority business procurement to the Department of Minority Business Enterprise.

*C. Whenever there exists (i) a rational basis for small business enhancement or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the Governor is authorized and encouraged to require state agencies to implement appropriate enhancement or remedial measures consistent with prevailing law. For the purposes of this subsection, "state agency" means any authority, board, department, instrumentality, institution, agency or other unit of state government. "State agency" shall not include any county, city or town.*

D. In the solicitation or awarding of contracts, no state agency, department or institution shall discriminate against a bidder or offeror because the bidder or offeror employs ex-offenders unless the state agency, department or institution has made a written determination that employing ex-offenders on the specific contract is not in its best interest.

§ [2.2-4343](#). Exemption from operation of chapter for certain transactions.

A. The provisions of this chapter shall not apply to:

1. The Virginia Port Authority in the exercise of any of its powers in accordance with Chapter 10 (§ [62.1-128](#) et seq.) of Title 62.1, provided the Authority implements, by policy or regulation adopted by the Board of Commissioners and approved by the Department of General Services, procedures to ensure fairness and competitiveness in the procurement of goods and services and in the administration of its capital outlay program. This exemption shall be applicable only so long as such policies and procedures meeting the requirements remain in effect.

2. The Virginia Retirement System for selection of services related to the management, purchase or sale of authorized investments, including but not limited to actuarial services. Selection of these services shall be governed by the standard set forth in § [51.1-124.30](#).

3. The State Treasurer in the selection of investment management services related to the external management of funds shall be governed by the standard set forth in § [2.2-4514](#), and shall be subject to competitive guidelines and policies that are set by the Commonwealth Treasury Board and approved by the Department of General Services.

4. The Department of Social Services or local departments of social services for the acquisition of motor vehicles for sale or transfer to Temporary Assistance to Needy Families (TANF) recipients.

5. The University of Virginia in the selection of services related to the management and investment of its endowment funds, endowment income, or gifts pursuant to § [23-76.1](#). However, selection of these services shall be governed by the Uniform Management of Institutional Funds Act (§ [55-268.1](#) et seq.) as required by § [23-76.1](#).

6. The Board of the Virginia College Savings Plan for the selection of services related to the operation and administration of the Plan, including, but not limited to, contracts or agreements for the management, purchase, or sale of authorized investments or actuarial, record keeping, or consulting services. However, such selection shall be governed by the standard set forth in § [23-38.80](#).

7. Public institutions of higher education for the purchase of Items for resale at retail bookstores and similar retail outlets operated by such institutions. However, such purchase procedures shall provide for competition where practicable.

8. The purchase of goods and services by agencies of the legislative branch that may be specifically exempted therefrom by the Chairman of the Committee on Rules of either the House of Delegates or the Senate. Nor shall the contract review provisions of § [2.2-2011](#) apply to such procurements. The exemption shall be in writing and kept on file with the agency's disbursement records.

9. Any town with a population of less than 3,500, except as stipulated in the provisions of §§ [2.2-4305](#), [2.2-4308](#), [2.2-4311](#), [2.2-4315](#), [2.2-4330](#), [2.2-4333](#) through [2.2-4338](#), [2.2-4343.1](#), and [2.2-4367](#) through [2.2-4377](#).

10. Any county, city or town whose governing body has adopted, by ordinance or resolution, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by such governing body and its agencies, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies and procedures meeting the requirements of § [2.2-4300](#), remain in effect in such county, city or town. Such policies and standards may provide for incentive contracting which offers a contractor whose bid is accepted the opportunity to share in any cost savings realized by the locality when project costs are reduced by such contractor, without affecting project quality, during construction of the project. The fee, if any, charged by the project engineer or architect for determining such cost savings shall be paid as a separate cost and shall not be calculated as part of any cost savings.

11. Any school division whose school board has adopted, by policy or regulation, alternative policies and procedures which are (i) based on competitive principles and (ii) generally applicable to procurement of goods and services by the school board, except as stipulated in subdivision 12.

This exemption shall be applicable only so long as such policies and procedures, or other policies or procedures meeting the requirements of § [2.2-4300](#), remain in effect in such school division. This provision shall not exempt any school division from any centralized purchasing ordinance duly adopted by a local governing body.

12. Notwithstanding the exemptions set forth in subdivisions 9 through 11, the provisions of subsections C and D of § [2.2-4303](#), and §§ [2.2-4305](#), [2.2-4308](#), [2.2-4311](#), [2.2-4315](#), [2.2-4317](#), [2.2-4330](#), [2.2-4333](#) through [2.2-4338](#), [2.2-4343.1](#), and [2.2-4367](#) through [2.2-4377](#) shall apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500 in the Commonwealth.

The method for procurement of professional services set forth in subdivision 3 a of § [2.2-4301](#) in the definition of competitive negotiation shall also apply to all counties, cities and school divisions, and to all towns having a population greater than 3,500, where the cost of the professional service is expected to exceed \$30,000 in the aggregate or for the sum of all phases of a contract or project. A school board that makes purchases through its public school foundation or purchases educational technology through its educational technology foundation, either as may be established pursuant to § [22.1-212.2:2](#) shall be exempt from the provisions of this chapter, except, relative to such purchases, the school board shall comply with the provisions of §§ [2.2-4311](#) and [2.2-4367](#) through [2.2-4377](#).

13. A public body ~~which~~ *that* is also a utility operator may purchase services through or participate in contracts awarded by one or more utility operators ~~which~~ *that* are not public bodies for utility marking services as required by the Underground Utility Damage Prevention Act (§ [56-265.14](#) et seq.). A purchase of services under this subdivision may deviate from the procurement procedures set forth in this chapter upon a determination made in advance by the public body and set forth in writing that competitive sealed bidding is either not practicable or not fiscally advantageous to the public, and the contract is awarded based on competitive principles.

14. Procurement of any construction or planning and design services for construction by a Virginia nonprofit corporation or organization not otherwise specifically exempted when (i) the planning, design or construction is funded by state appropriations of \$10,000 or less or (ii) the Virginia nonprofit corporation or organization is obligated to conform to procurement procedures that are established by federal statutes or regulations, whether those federal procedures are in conformance with the provisions of this chapter.

15. Purchases, exchanges, gifts or sales by the Citizens' Advisory Council on Furnishing and Interpreting the Executive Mansion.

16. The Eastern Virginia Medical School in the selection of services related to the management and investment of its endowment and other institutional funds. The selection of these services shall, however, be governed by the Uniform Management of Institutional Funds Act (§ [55-268.1](#) et seq.).

17. The Department of Corrections in the selection of pre-release and post-incarceration services.

18. The Board of the Chippokes Plantation Farm Foundation in entering into agreements with persons for the construction, operation, and maintenance of projects consistent with the Chippokes Plantation State Park Master Plan approved by the Director of the Department of Conservation and Recreation pursuant to the requirements of § [10.1-200.1](#) and designed to further an appreciation for rural living and the contributions of the agricultural, forestry, and

natural resource based industries of the Commonwealth, provided such projects are supported solely by private or nonstate funding.

*19. The purchase of goods and services by a local governing body or any authority, board, department, instrumentality, institution, agency or other unit of state government when such purchases are made under a remedial plan established by the Governor pursuant to subsection C of § [2.2-4310](#) or by a chief administrative officer of a county, city or town pursuant to § [15.2-965.1](#).*

B. Where a procurement transaction involves the expenditure of federal assistance or contract funds, the receipt of which is conditioned upon compliance with mandatory requirements in federal laws or regulations not in conformance with the provisions of this chapter, a public body may comply with such federal requirements, notwithstanding the provisions of this chapter, only upon the written determination of the Governor, in the case of state agencies, or the governing body, in the case of political subdivisions, that acceptance of the grant or contract funds under the applicable conditions is in the public interest. Such determination shall state the specific provision of this chapter in conflict with the conditions of the grant or contract.

*§ [15.2-965.1](#). Participation of small, women- and minority-owned businesses.*

*Any locality may enact an ordinance providing that whenever there exists (i) a rational basis for small business enhancement, or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses, the chief executive of the local governing entity shall be authorized and encouraged to require implementation of appropriate enhancement and remedial measures consistent with prevailing law.*

2. That any analysis that is used by the Governor or a locality as a basis for determining the existence of discrimination based on race or gender in the awarding of contracting opportunities shall use the standards established by the United States Supreme Court in *The City of Richmond v. J. A. Croson Company*, 488 U.S. 469, (1985) and any subsequent decisions of the United States Supreme Court or other binding authority concerning such standards.



## COMMONWEALTH of VIRGINIA

Office of the Governor

Mark R. Warner  
Governor

William H. Leighty  
Chief of Staff

July 30, 2004

### **MEMORANDUM**

TO: Heads of Executive Branch Agencies, Independent Agencies, and Institutions of Higher Education

C: The Governor's Cabinet

FROM: William H. Leighty

SUBJECT: SWAM Procurement

This memorandum addresses Governor Warner's plans for increasing state procurement from small, women-owned, and minority-owned (SWAM) businesses. Normally I would distribute this type of information through the Leadership Communiqué. However, because of the high priority that Governor Warner places on this topic, I am distributing this to you directly. This memorandum supplements and supercedes a memorandum dated July 6, 2004 that you may have received from DMBE.

Executive Order 29, issued in July 2002 by Governor Warner, established the framework for the participation of small businesses and businesses owned by women and minorities in the Commonwealth's purchasing programs. Since EO 29 was issued, the Commonwealth has made significant progress towards diversifying its supply chain. For example, the 3<sup>rd</sup> Quarter FY 04 SWAM Procurement Report showed that, over the last 7 quarters, purchases from minority-owned vendors had risen from 1.57% to 2.55% and from women-owned vendors from 0.93% to 2.10%. However, the progress we are making is slow and unsatisfactory.

The Governor has now approved certain key recommendations of the Intersecretarial Task Force on Minority Procurement. These recommendations both continue and expand the thrust of EO 29 by directing agencies to adopt more specific and extensive remediation strategies. These strategies are based in

significant part on the findings of the *Procurement Disparity Study of the Commonwealth of Virginia* prepared earlier this year by MGT of America.

I have attached to this memorandum those recommendations that you and your agency or institution need to implement. In particular, note that the recommendations include statewide aspirational procurement goals for small, women and minority businesses. Your agency or institution will need to develop a specific plan for achieving your particular SWAM procurement goals, and complete that plan by September 1, 2004 where possible, and no later than October 1, 2004. Each institution and agency's plan will likely vary from the state goals, and that is to be expected. This is not a one-size fits all situation. However, we expect the sum of the agency/institution plans to reflect the overall state aspirational goals, so be sure to push for plans that help us achieve these important goals.

Your procurement officers will be concerned about the relationship of the SWAM procurement rules and goals and the Virginia Public Procurement Act (VPPA) and other procurement rules. SB 598 adopted by the 2004 General Assembly provides that, when purchases are made under a remedial plan established by the Governor, they may be partially exempt from the VPPA. Therefore, the Department of General Services/Division of Purchasing and Supply will soon distribute changes to the Agency Procurement and Surplus Property Manual. Entities such as VITA, decentralized institutions, and independent agencies will need to adopt similar changes to their rules and procedures.

Please note that the SWAM procurement rules do not direct or encourage agencies or institutions to accept a bad business deal or a lower quality vendor, product or service in order to meet SWAM goals. To the contrary, these SWAM rules specifically state that quality, price and terms should not be sacrificed in any meaningful way in order to achieve our SWAM procurement goals. I am confident that we can achieve these SWAM goals without reducing quality or increasing costs.

If you have questions about these rules generally or about preparing your plan, please call DMBE for assistance. For example, there may be a procurement category of importance to your agency/institution but your purchasers have been unable to identify minority vendors. DMBE can help in identifying those vendors. DMBE can be reached by calling Ed Hamm or Jean Bass at 786-6585. Or perhaps your agency/institution has questions about how to implement the new procurement rules regarding small purchases or issues regarding construction contracts. DMBE and DGS can help with these issues. At DGS, you can call Rich Sliwoski for the construction contract issues and Ron Bell for other

questions. They can be reached at 804-786-3311. For technology purchases, Susan Wooley at VITA can provide guidance. Susan can be reached at 804-343-9004.

Thank you for your help in achieving these important procurement goals.

Attachment Below

July 2004

# **SWAM Procurement Programs**

to be

## **Implemented by Agencies and Institutions**

### **A. Aspirational Goals**

1. **Statewide Goals.** Based on the Procurement Disparity Study, the Governor has adopted the statewide aspirational procurement goals set forth below. The percentage goals set forth below apply to the dollar value of the applicable contracts and procurements.
  - a. Small Business Procurement Goal: Adopt a statewide aspirational small business goal of 40% combined prime and sub contracts with the state.
  - b. In those procurement areas identified in the Disparity Study as having a minority availability above 1.0%, adopt the following specific statewide aspirational procurement goals for minority and women-owned businesses: **(Please note that the following detailed goals are statewide goals and not individual agency goals, see paragraph A 2 for an explanation.)**

#### Construction Prime Contractors

AA*	3.56%
NW*	5.56%
HA*	1.47%

#### Construction Sub Contractors

AA	5.03%
HA*	3.73%
AsA*	2.02%
NW	6.95%

#### A&E and Professional Services Prime Contractors

AA	4.97%
HA	2.48%
AsA	4.97%
NW	16.04%

#### Other Services – Prime Contractors

AA	8.52%
HA	2.51%
AsA	4.30%
NW	21.72%

Goods and Supplies

AA	4.23%
HA	1.51%
AsA	5.08%
NW	17.33%

\* AA means African American

\*NW means Non-minority women

\*HA means Hispanic American

\*AsA means Asian American

2. **Agency Plans.** Each agency and institution of the Commonwealth shall adopt an annual SWAM Procurement Plan that will specify that agency's or institution's plans and goals for SWAM procurement. Each agency's initial SWAM Procurement Plan shall be completed by September 1, 2004 where possible and in any event by September 15, 2004. **Note: agency SWAM procurement plans should include overall goals for establishing a "best effort" of purchasing from minority business vendors and you do not need to be establish agency goals broken down by ethnicity, as are the statewide goals.** To assist agencies in developing their SWAM Procurement Plans, DMBE will develop and distribute plan guidelines that agencies may follow. Because of differences in the available vendors and goods and services purchased by various agencies and institutions, it is anticipated that each agency's and institution's SWAM Procurement Plan will vary according to that agency's or institution's particular procurement circumstances. Some agency plans will call for SWAM procurement at levels below the statewide aspirational goals, and some will call for procurement at levels above the statewide aspirational goals. One size will not fit all. Where applicable and verifiable, "second tier" SWAM participation should be considered by agencies and institutions in preparing their agency plans in those circumstances where such second tier participation is assured by contract or other firm arrangement.
3. **Publication of Results.** Beginning with the 4<sup>th</sup> Quarter FY04 report, the quarterly SWAM Reports shall be made electronically and publicly available on the DMBE website, delineated by Secretariat and by agency and institution.
4. **Management Evaluation.** Progress toward achievement of an agency's or institution's SWAM Procurement Plan shall be included in the evaluation criteria for the chief executive officer for each such agency and institution, and shall be included by such chief executive officer in the evaluation criteria for their applicable senior management and procurement personnel.



## B. Certification

Certification of SWAM vendors is necessary in order to obtain accurate and easily accessible data on SWAM Procurement and to assure a consistent and appropriate approach to compliance issues. In the past, many SWAM vendors saw no benefit in becoming certified so failed to do so. These new programs will provide important incentives to SWAM vendors to encourage them to become certified.

1. **Certified Vendors.** Beginning October 1, 2004, for the purposes of state procurement rules, no vendor shall be considered a Small Business Enterprise, a Minority Owned Business Enterprise or a Women-Owned Business Enterprise, or be entitled to the benefits of the state SWAM procurement opportunities, unless certified as such by the Commonwealth. All certified SWAM vendors shall be assigned a specific identification number, and through that process, standardized reports will be able to be generated from CARS, eVA and other state reporting systems. No vendor shall be required to certify under this program and no vendor shall be excluded from doing business with the Commonwealth because of their failure to certify as a SWAM vendor; provided, however, a qualified vendor who fails to certify shall be disqualified for participation in the applicable SWAM procurement programs.
2. **Definitions.** The definitions set forth below shall be applicable to SWAM vendors doing business with the Commonwealth, although federal definitions shall govern with respect to meeting federally funded highway construction and other applicable federally financed programs goals, and that, to the extent necessary, the Governor proposes legislation to codify these definitions for the purpose of this SWAM procurement program.

**Minority-Owned Business Enterprise:** A business concern which is at least 51 percent owned by one or more minorities or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more minorities and whose management and daily business operations are controlled by one or more of such individuals.

**Minority Individual:** "Minority" means a person who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions:

"Asian Americans" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Marinas, the Philippines, U. S. territory of the Pacific, India, Pakistan, Bangladesh and Srilanka and who

are regarded as such by the community of which these persons claim to be a part.

"African Americans" means all persons having origins in any of the original peoples of Africa and who are regarded as such by the community of which these persons claim to be a part.

"Hispanic Americans" means all persons having origins in any of the Spanish speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who are regarded as such by the community of which these persons claim to be a part.

"Native Americans" means all persons having origins in any of the original peoples of North America and who are regarded as such by the community of which these persons claim to be a part or who are recognized by a tribal organization.

"Eskimos and Aleuts" means all persons having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia and who are regarded as such in the community of which these persons claim to be a part.

**Small Business Enterprise:** "Small business enterprise" shall mean an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years. Nothing in this provision prevents a program, agency, institution or subdivision from complying with the qualification criteria of a specific state program or a federal guideline to be in compliance with a federal grant or program.

**Woman-Owned Business Enterprise:** A business concern which is at least 51 percent owned by one or more women who are U.S. citizens or legal resident aliens, or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more women, and whose management and daily business operations are controlled by one or more of such individuals.

**Disadvantaged Business Enterprise:** A small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled

by one or more of the socially and economically disadvantaged individuals who own it.

## C. **Contract Sizing**

The size of a proposed procurement can limit the potential participation by SWAM vendors. The following rules are designed to address that issue, while being sure to preserve the cost-savings and other benefits that the Commonwealth has achieved through bundling contracts and other procurement initiatives.

1. **Assessing Bundled Contracts.** For goods provided under statewide or regionally bundled contracts for which there are qualified available SWAM vendors, but with respect to which the size of such contract appears to limit SWAM vendors from bidding or winning such contracts, the contracting agency or institution seek to reduce the size of the contracts to increase the pool of potential bidders to include SWAM vendors. If the effect of reducing the size of such contracts is to cause a meaningful increase in price, a significant degradation in terms and conditions, a significant decrease in administrative efficiency or non-compliance with applicable federal contracting requirements or funding conditions, then the contracting agency or institution shall not be obligated to so reduce the contract size.
2. **Prime Contractor SWAM Procurement Plan.** Any contracting agency or institution that has established a SWAM Procurement Plan with identified goals for minority and women-owned business procurement, may include those goals as conditions or pre-qualification requirements in the terms and conditions for the award of any prime contract in excess of \$100,000 and, if so included, may reflect those goals in the requirement for a subcontracting plan prepared and submitted prior to award for goods and non-professional services and within 30 days of award for construction and professional services. For contracts in which the subcontractor plan is due prior to award, failure to submit the plan in timely fashion shall disqualify the contractor from receiving the award. For contracts in which the subcontractor plan may be submitted within 30 days after award, failure to submit the required plan in timely fashion, including any applicable cure periods, shall be cause for contract termination or other appropriate remedies (including the obligation on the part of the contractor to continue full contract performance notwithstanding the withholding of progress payments until the required plan is submitted). A Virginia-certified M/W contractor who serves as prime contractor will receive credit for M/W subcontracting for work performed by such prime.
3. **Construction Contracts.** If the size of vertical or horizontal construction contracts appear to limit SWAM vendors from bidding or winning such contracts, then the contracting agency seek to reduce the size of the contracts to increase the pool of potential SWAM bidders. If the effect of reducing the size of such contracts is to cause a meaningful increase in price, a significant degradation in

terms and conditions, a significant decrease in administrative efficiency or non-compliance with applicable federal contracting requirements or funding conditions, then the contracting agency or institution shall not be obligated to so reduce the contract size. In the case of construction contracts awarded to non-SWAM primes, the prime contractor shall seek to size the subcontracts so as to enable qualified SWAM subcontractors to bid effectively for such work so long as the effect of reducing the size of such subcontracts does not cause a meaningful increase in price or a significant degradation in terms, conditions or other applicable contract factors. In the case of non-highway construction, where appropriate for the construction job in question, the Commonwealth shall consider using a Construction Manager At Risk instead of a prime contractor in order to afford opportunities for M/W contractors to bid effectively for the work in question. Nothing contained in this paragraph shall require the contracting agency to accept contractors who do not meet applicable quality, safety and performance standards.

4. **Small Procurements.** The current procurement regulations have been modified to provide that for all small procurements under \$5,000, at least one M/W Vendor be solicited. Procurement regulations applicable to IFBs and RFPs for amounts up to \$100,000 that require solicitation of multiple vendors have been modified to permit award to a reasonably priced M/W Vendor or highest ranking offer that is other than the lowest priced vendor when such purchases are made by a public body that has established a SWAM Procurement Plan.
5. **Consultation with DMBE.** Each contracting agency or institution, in consultation with DMBE where practical, shall seek to identify those purchases in which contract sizing may influence the availability of purchasing opportunities to SWAM vendors (a "Size-Related Contract"). Where these purchases are identified, the agency shall determine whether there are M/W Vendors capable of meeting the purchasing requirements. If the agency identifies no M/W Vendors capable of performing the contract requirements, then the agency shall consult with DMBE to seek to identify available M/W Vendors unless contract timing issues require the agency or institution to complete the contract process before DMBE input can be obtained. For any Size-Related Contract for which the agency or institution determines that contract timing issues require contract award without identifying any M/W Vendors or consultation with DMBE, the agency or institution shall consult with DMBE promptly after award of the contract to develop potential M/W Vendors for the next similar procurement.
6. **Evidence of Compliance.** Each prime contractor who wins an award in which provision of a SWAM procurement plan is a condition to the award, shall deliver to the contracting agency or institution, on or before request for final payment, evidence and certification of compliance (subject only to insubstantial shortfalls and to shortfalls arising from subcontractor default) with the SWAM procurement plan. Final payment under the contract in question may be withheld until such certification is delivered and, if necessary, confirmed by the agency or institution,

or other appropriate penalties may be assessed in lieu of withholding such payment.

## **D. Increasing Availability**

The Disparity Study demonstrates that there is a low availability of minority firms in Virginia, relative both to the minority population in Virginia and to the availability of minority firms in adjoining states.

1. **Increasing Number of Available M/W Firms**. State agencies and institutions shall work together with DMBE and DBA to seek to increase the number of qualified M/W vendors who are available to do business with the Commonwealth. If state agencies or institutions are having difficulty in identifying sufficient available M/W vendors for particular areas of procurement, then those agencies and institutions shall work with their vendor organizations, DMBE and DBA in order to identify additional M/W vendors.
2. **Improved Data Access**. As soon as reasonably possible, in addition to its normal contract postings, each agency and institution shall post or provide accessible links to procurement information on eVA, VBO and VITA websites, in easily accessible form and in a location identified for SWAM procurement, including notices of contract opportunities. These postings will include (a) all existing term contracts with expiration dates, with such expiration dates clearly identified, (b) anticipated IFBs and RFPs that have not yet been developed including a best estimate of the date of issue of such IFBs and RFPs and contact information for potential vendors for pre-issuance contract information, and (c) other anticipated contract opportunities. This site shall be linked to the DMBE website.

## **E. Other**

**Audits**. In order to assure compliance with certification requirements, SWAM subcontracting plans, and the other provisions set forth above, the contracting or certifying agency or institution, in cooperation with DMBE and DGS, shall contractually provide for appropriate auditing of vendors and contracts. Such audits shall include the right to make on site audits at any time during the term of the applicable contract or certification.”

End of Revision 1

This Revision 1 is being applied to the CPSM and the revised CPSM document is being posted on the BCOM Website as “CPSM-2004 w/ Rev 1”.